No. 02-1142

IN THE
SUPREME COURT OF THE UNITED STATES

TY INC.,
Petitioner,
v.

RUTH PERRYMAN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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ADDITIONAL RELEVANT STATUTORY PROVISIONS

The relevant provisions of the Lanham Act's trademark infringement and unfair competition provisions, 15 U.S.C. §§ 1114(1) and 1125(a), are reproduced in the Appendix at Res. App. 7a-9a.

COUNTER-STATEMENT OF THE CASE

The ruling of the district court below on cross-motions for summary judgment granted summary judgment to Ty Inc., the petitioner, on Count III trademark dilution (15 U.S.C. § 1125(c)) and denied both summary judgment motions on Counts I, II and IV which alleged trademark infringement and unfair competition under the Lanham Act, 15 U.S.C. §§ 1114(1) and 1125(a), and state law claims for deceptive practices. Pet. App. 28a, 57a. Thereafter the petitioner first moved for entry of final judgment as to dilution (judgment on fewer than all of the claims), which motion was denied, and then the petitioner voluntarily dismissed its remaining counts (including its trademark infringement and unfair competition counts) with prejudice. Res. App. 1a-2a. A Final Judgment Order was also entered by the district court when the remaining counts were dismissed with prejudice. Res. App. 3a-4a. The respondent then appealed, which resulted in the present Seventh Circuit's opinion directed to dilution under 15 U.S.C. § 1125(c), and not directed to trademark infringement and unfair competition (15 U.S.C. §§ 1114(1) and 1125(a)) of the counts which had been dismissed with prejudice. On remand to the district court from the Seventh Circuit, the district court entered a new Final Judgment Order enjoining respondent from advertising or selling any non-Ty products at any web site containing Beanie or Beanies within the domain name. Res. App. 5a-6a.

REASONS FOR DENYING THE WRIT

The question presented by the petitioner is whether every third-party reseller of goods bearing famous trademarks has a right, as a matter of law, to incorporate the famous marks into the reseller's business name and Internet domain name, or whether such conduct instead constitutes dilution of the trademarks under the FTDA. Pet. at *i*. The petitioner argues that the Seventh Circuit's opinion holds that a reseller of a product has a *per se* legal right to use a famous trademark in its business name and domain name. According to the petitioner, the upshot of such ruling is that the owners of famous marks now face the immediate prospect of the value of their marks being diluted, distorted, and undermined by tens of thousands of unrelated parties solely because these third parties sell or resell the trademark owner's products. Pet. at 1-2. The Seventh Circuit's opinion, however, does not hold what the petitioner claims it holds; the parade of trademark horrors projected by the petitioner arises from a "straw man" ruling that it created, not from the opinion issued by the Seventh Circuit.

That the Seventh Circuit's ruling does not hold that any reseller has a *per se* legal right to use the product's trademark in its business name and domain name is seen repeatedly in this fact specific decision. The Seventh Circuit, as to respondent's sales of petitioner's products, found that confusion is not a factor. Pet. App. 1a-3a. Further, the respondent's use of the Bargain Beanies business name and the bargainbeanies.com domain name did not constitute blurring nor tarnishment because she is not producing a product or selling a service, and rather she is selling the very product to which the trademark is attached. Pet. App. 4a-7a. The Seventh Circuit then refused to extend the antidilution law beyond the basic blurring and tarnishment concepts here because (1) the

mark "Beanies" describes a basic element of the product, (2) "Beanies" is catchier than "beanbag toys" and (3) the petitioner's own marketing strategy created the secondary market in which respondent operates. Pet. App. 5a-10a. The Seventh Circuit refused to allow the petitioner to use the FTDA to own its aftermarket and impede sellers in the aftermarket. Pet. App. 7a-*8a*. There are no *per se* rules nor far reaching implications for owners of famous marks, particular distinctive (unrelated to the product) marks, in the Seventh Circuit's ruling. The Lanham Act's prohibitions on trademark infringement and unfair competition (15 U.S.C. §§ 1114(1) and 1125(a)) are fully available to trademark owners to employ against activities which mislead and deceive the public by creating a false perception that a third-party is sponsored by, connected with, endorsed by or supervised by the trademark owner when they are not. The Lanham Act's prohibitions on dilution of famous marks (15 U.S.C. § 1125(c)) are fully available to trademark owners to employ against activities which dilute their famous marks. In short, the Seventh Circuit's ruling is limited to dilution and the case specific facts, including petitioner's own marketing strategy, as the Seventh Circuit explained:

> But this case is unusual because, given Perryman's status as a seller in the secondary market created as a result of Ty's marketing strategy, we cannot imagine a state of facts consistent with the extensive record compiled in the summary judgment proceeding that could possibly justify an injunction against Perryman's representing in her business name and Internet and Web addresses that she is doing what she has

a perfect right to do, namely sell Beanie Babies.

Pet. App. 11a-12a.

The Seventh Circuit's ruling was proper in all respects, is not in conflict with any case law, and the respondent respectfully requests this Honorable Court to deny the Petition for Writ of Certiorari.

I. THE SIXTH CIRCUIT HAS NULLIFIED THE "PACCAR" DILUTION ANALYSIS

The petitioner relies heavily on, and quotes directly from, the dilution analysis in *PACCAR, Inc. v. TeleScan Techs., LLC.*, 115 F.Supp.2d 772 (E.D. Mich. 2000), which is a decision granting a preliminary injunction. Pet. at 10, 11, 13. Subsequently, however, the Sixth Circuit affirmed the preliminary injunction on the likelihood of success on merits of the trademark infringement claim only, and nullified the district court's trademark dilution analysis, noting that the district court engaged in a cursory analysis and failed to apply the required factors. *PACCAR, Inc. v. TeleScan Techs.*, LLC., ___ F.3d ___ (6th Cir. 2003) 2003 WL 244803 *11.

II. THE RULING DOES NOT CONFLICT WITH CASE LAW

The Seventh Circuit's ruling does not, and cannot, conflict with petitioner's "automobile reseller" authorities (Pet. at 7-9); these are trademark infringement and unfair competition decisions under 15 U.S.C. §§ 1114(1) and 1125(a) in which confusion or the likelihood of confusion, particularly consumers' false belief they

were dealing with an authorized franchised dealer, was the *determining* factor. The Third Circuit upheld a preliminary injunction enjoining use of designations such as "Volkswagen Dealer" except in conjunction with the legend 'Not a Franchised Volkswagen Dealer' to prevent the consumer confusion created by defendant's falsely holding itself out as an authorized franchised Volkswagen Dealer. *Volkswagenwerk Aktiengesellschaft v. Volks City, Inc.*, 348 F.2d 659, 660 (3rd Cir. 1965). Likewise the Fifth Circuit, in *Trail Chevrolet, Inc. v. General Motors Corp.*, 381 F.2d 353 (5th Cir. 1967) and in *Volkswagenwerk Aktiengesellschaft v. Rickard,* 492 F.2d 474, 478 (5th Cir. 1974) held that there was ample evidence supporting the findings that the accused uses were likely to cause confusion, and to mislead and deceive the public regarding authorized dealer status, under trademark infringement and unfair competition counts. The absence of any *per se* rules even on trademark infringement and unfair competition prohibitions is highlighted by the Ninth Circuit in *Volkswagenwerk Aktiengesellschaft v. Church,* 411 F.2d 350, 352 (9th Cir. 1969), the Ninth Circuit stating that the question is one of fact, and each case of this type must be decided on its own facts.

The absence of any *per se* rules even on trademark infringement and unfair competition is also seen in the above case law in the reliance on other factors that convey the false impression of authorized dealership status. In *Volks City, id.* at 660 these other factors include advertising references to "brand new" and "factory fresh" and a location well known as trademark owner's headquarters and principal manufacturing point. In *Rickard, id.* at 475 and 477-78, the ruling was expressly deemed supported by the cumulative effect of the use of five of the

trademark owner's trademarks, including a logo, and the precise mimicking of authorized dealers' advertising.

These four ineptly styled "automobile resellers" decisions[1] are wholly reconcilable with the Seventh Circuit's ruling and the petitioner misinforms by bundling trademark dilution together with trademark infringement and unfair competition under the rubric of "trademark laws." Pet. at 1, 6, 7, 12, 16. Again, the petitioner voluntarily dismissed with prejudice its trademark infringement and unfair competition counts, and the Seventh Circuit's ruling expressly found that confusion was not a factor. Res. App. 2a. Pet. App. 3a. The Seventh Circuit's ruling implicitly recognizes that trademark dilution is a discrete part of the trademark laws with different, and not inherently lesser, standards, and applied those standards to specific and unusual facts. Pet. App. 1a-12a.

The petitioner is also incorrect regarding a conflict with the Second Circuit's opinion in *Nabisco, Inc. v. PF Brands, Inc.*, 191 F.3d 208 (1999).[2] Pet. at 4, 10, 15, 16. The factual differences in *Nabisco, id.* are three-fold; the trademark was used on a third party product, the accused use caused confusion and the trademark was not only famous but also "distinctive" in the trademark sense of being unrelated to the product. *Nabisco, id.* at 215-18. The Seventh Circuit's sharp comments on the

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1 In *Rickard, id.* and *Church, id.* the accused were not selling or reselling the trademark owner's product, but rather they were selling their own services.

2 *Nabisco, id.* is cited in the present Seventh Circuit's opinion (Pet. App. at 2a).

respondent's sales of third party products, although the sales were of minor volume, demonstrate an accord, not a conflict, between the Seventh Circuit's ruling and the Second Circuit's ruling in *Nabisco, id.* Pet. App. 10a-11a.

The petitioner is incorrect regarding a conflict with the Toeppen line of case law.[3] Pet. at 10. As explained by the Ninth Circuit in the culminate ruling in *Panavision International, L.P. v. Toeppen,* 141 F.3d 1316, 1325-1327 (1998), Toeppen's wrongful "business" activity was to register trademarks as domain names and then sell them to the rightful trademark owners. The respondent sells second-hand beanbag animals. Pet. App. 1a. The Seventh Circuit's ruling even described and distinguished such core cybersquatting activities. Pet. App. 8a.

The petitioner is incorrect regarding a conflict with Third Circuit opinion in *Times Mirror Magazines, Inc. v. Las Vegas Sports News, L.L.C.,* 212 F.3d 157 (3rd Cir. 2000) (Pet. at 14), the Fourth Circuit's opinion in *Ringling Bros.-Barnum & Bailey Comb. Shows, Inc. v. Utah Div. Travel Dev.*, 170 F.3d 449 (4th Cir. 1999) (Pet. at 15), the Second Circuit's opinion in *Federal Express Corp. v. Federal Espresso, Inc.,* 201 F.3d 168 (2nd Cir. 2000) (Pet. at 15), and the Sixth Circuit's opinion in *V. Secret Catalogue, Inc. v. Moseley,* 259 F.3d 464 (6th Cir. 2001), *cert. granted,* 122 S.Ct. 1536 (2002) (Pet. at 14, 15). In all four opinions, the asserted trademark was used on a third party product or to sell a third-party service. *Times Mirror, id.* at 160.

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[3] Two of the "Toeppen" decisions were cited in the Seventh Circuit's opinion in connection with the observation that a few cases suggest that the concept of dilution is not exhausted by blurring and tarnishment. Pet. App. 5a-6a.

Ringling Bros., id. at 451. *Federal Express, id.* at 170. *V. Secret Catalogue, id.* at 466-47.

The only other case law above the district court level which is cited by the petitioner is *Brookfield Communications, Inc. v. West Coast Entertainment Corp.*, 174 F.3d 1036 (9th Cir. 1999). Pet. at 13, footnote 2. *Brookfield Communications, id.* is a trademark infringement case and therefore, as explained above, the Seventh Circuit's ruling does not, and cannot, conflict with it. *Brookfield Communications, id.* at 1041.

Regarding a conflict with the published and unpublished district court case law cited by the petitioner, any such conflict would not present a compelling reason to grant the Petition, and there is no conflict. The majority of these district court decisions present no conflict simply because they, like the "automobile resellers" case law discussed above, are trademark infringement and unfair competition decisions. In this category are the decisions of: *General Motors Corp. v. Smith,* 138 U.S.P.Q. 382 (S.D. Cal. 1963) (Pet. at 9); *Lincoln Motor Co. v. Lincoln Automobile Co.,* 44 F.(2d) 812 (N.D. Ill. 1930) (Pet. at 9); *Ford Motor Co. v. Weibel,* 262 F.Supp. 932 (D.R.I. 1967) (Pet. at 9); *Dr. Ing. H.C.F. Porsche AG v. Zim,* 481 F.Supp. 1247 (N.D.Tex. 1979) (Pet. at 8); *Volkswagenwerk Aktiengesellschaft v. Karadizian,* 170 U.S.P.Q. 565 (C.D.Cal. 1971) (Pet. at 9); *Volkswagenwerk Aktiengesellschaft v. Brewer*, 170 U.S.P.Q. 560 (D.Ariz. 1971) (Pet. at 9); *Volkswagenwerk G.m.b.H. v. Frank,* 198 U.S.P.Q. 916 (D.Colo. 1961) (Pet. at 9); *Volkswagenwerk Aktiengesellschaft v. Tatum,* 344 F.Supp. 235 (S.D.Flor. 1972) (Pet. at 9); *Porsche Cars North America Inc. v. Manny's Porshop, Inc.,* 972 F.Supp. 1128 (N.D.Ill. 1997) (Pet. at 11);

Green Products Co. v. Independence Corn By-Products Co., 992 F.Supp. 1070 (N.D. Iowa 1997) (Pet. at 12); *Teletech Customer Care Management, Inc. v. Tele-Tech Company, Inc.*, 977 F.Supp. 1407 (C.D.Cal. 1997) (Pet. at 13); *Playboy Enters., Inc. v. Asiafocus Intern., Inc.*, 1998 WL 724000 (E.D. Va April 10, 1998) (Pet. at 13). Other district court decisions do not conflict because the trademark was unrelated to the nature of the product, the trademark was used to sell a third party's own product or service, and the likelihood of confusion was enhanced by other factors such as use of the trademark's distinguished script or the trademark owner's logo. In this category are the decisions of: *Trans Union LLC v. Credit Research, Inc.*, 142 F.Supp.2d 1029 (N.D.Ill. 2001) (Pet. at 4, 11); *General Motors Corp. v. E-Publications LLC*, 2001 WL 1798648 (E.D.Mich. Nov. 26, 2001) (Pet. at 11); *Caterpillar Inc. v. Telescan Technologies, L.L.C.*, 2002 WL 1301304 (C.D.Ill. Feb. 13, 2002) (Pet. at 11). (The decision of *PACCAR, Inc. v. TeleScan Techs., LLC.*, 115 F. Supp.2d 772 (E.D. Mich. 2000), *aff'd*, ___ F.3d ___ (6th Cir. 2003) 2003 WL 244803, which was nullified as to its dilution analysis by the Sixth Circuit as explained above, would have otherwise been in this category.) The remaining district court case law does not present a conflict because the trademark was used to sell a third party's product or service, and within this last category are the decisions of: *Ford Motor Co. v. Ford Financial Solutions, Inc.*, 103 F.Supp.2d 1126 (N.D.Iowa 2000) (Pet. at 12); *Victoria's Secret Stores v. Artco Equipment Co.*, 194 F.Supp.2d 704 (S.D.Ohio 2002) (Pet. at 12); *People for the Ethical Treatment of Animals, Inc. v. Doughney*, 133 F.Supp.2d 915 (E. D.Va. 2000), *aff'd*, 263 F.3d 359 (4th Cir. 2001) (Pet. at 13).

III. THE RULING DOES NOT LIMIT THE DILUTION CONCEPT

The petitioner contends that the Seventh Circuit's ruling confines the concept of what is dilution to three circumstances, namely blurring, tarnishment and free-riding. Pet. at 5. The petitioner misinforms. The Seventh Circuit's opinion first explains the concepts of blurring and tarnishment (Pet. App. 4a-5a) and then goes on to explore expansion of the dilution concept beyond blurring and tarnishment. The Seventh Circuit's opinion does not hold that the dilution concept is exhausted by blurring and tarnishment, but rather that none of the extended rationales support the petitioner's position not only because the respondent is reselling the petitioner's product, but also because the petitioner's marketing strategy created the secondary market, the trademark describes a basic element of the product, and the trademark is the catchier word for the product. Pet. App. 5a-10a.

In short, the Seventh Circuit's opinion leaves the concept of dilution open for possible expansion in other cases, while showing a strong displeasure with the petitioner's attempts to use its intellectual property to control peripheral markets. Pet. App. 8a.

IV. THE RULING DOES NOT PROVIDE A SAFE HARBOR UNDERMINING TRADE

The Seventh Circuit's ruling does not provide a safe harbor from the reach of trademark laws nor hamper overseas trade negotiations as the petitioner contends. Pet. at 7, 16, 17. As explained above, if consumer confusion is likely, the prohibitions

on trademark infringement and unfair competition are available. If famous marks are being diluted or tarnished, the FTDA is available, and further the concept of dilution remains open for expansion, including expansion to prevent marks unrelated to the nature of the product from becoming generic.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A - MINUTE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED JANUARY 9, 2002

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

Case Number: 1:99-cv-08190

Title: Ty Inc. v. Perryman

Assigned Judge: Honorable John F. Grady

MINUTE ORDER OF 1/9/02 by Hon. John F. Grady: Plaintiff's motion for entry of final judgment pursuant to F.R.C.P.54(B) is denied [52-1] ; and motion to continue trial date is granted [52-2] . Defendant's motion for an order requiring plaintiff to lucidly identify its trial exhibits is granted [50-1] ; parties are to serve each other with lists of their witnesses and documents that will be used in its case in chief by 1/23/02. Mailed notice.

This docket entry was made by the Clerk on January 11, 2002.

APPENDIX B - MINUTE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED MARCH 6, 2002

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

Case Number: 1:99-cv-08190

Title: Ty Inc. v. Perryman

Assigned Judge: Honorable John F. Grady

MINUTE ORDER OF 3/6/02 by Hon. John F. Grady: Plaintiff's motion for voluntary dismissal of its remaining counts with prejudice [55-1] and motion for entry of final judgment order [55-2] are granted with modifications. Trial date of 03/11/02 is vacated. Summary judgment was entered against the defendant for trademark dilution on 07/17/01. Each party will bear its costs and attorney fees for the entirety of this action at the District Court level terminating case. (Entered Final Judgment Order.) Mailed notice.

This docket entry was made by the Clerk on March 11, 2002.

APPENDIX C - FINAL JUDGMENT ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED MARCH 6, 2002

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 99 C 8190

TY INC.,

Plaintiff,

v.

RUTH PERRYMAN,

Defendant.

FINAL JUDGMENT ORDER

Having entered summary judgment against Defendant for trademark dilution on July 17, 2001, IT IS HEREBY ORDERED THAT:

1. Defendant and all of her agents, officers, employees, representatives, successors, assigns and all other persons acting for, with, by, through or under authority from Defendant, or in concert or participation with Defendant, are hereby permanently enjoined and restrained from using BEANIE or BEANIES or any colorable imitation thereof (whether alone or in connection with other terms) within any business name, Internet domain name, or trademark, or in

connection with any non-Ty products.

2. Each party will bear its own costs and attorney fees for the entirety of this action at the district court level.

DATE: March 6, 2002

ENTER: s/ John F. Grady

John F. Grady, United States District Judge

APPENDIX D - FINAL INJUNCTION ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED DECEMBER 3, 2003

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 99 C 8190

TY INC.,

Plaintiff,

v.

Defendant.

FINAL INJUNCTION ORDER

Pursuant to a remand from the United States Court of Appeals for the Seventh Circuit, IT IS HEREBY ORDERED THAT:

1. Defendant and all of her agents, officers, employees, representatives, successors, assigns and all other persons acting for, with, by, through or under authority from Defendant, or in concert or participation with Defendant, are hereby permanently enjoined and restrained from (a) using the trademarks BEANIE or BEANIES or any colorable imitation thereof (whether alone or in connection with other terms) in connection with any non-Ty products; and (b) advertising or selling any non-Ty products at any web site

containing the trademarks BEANIE or BEANIES or any colorable imitation thereof (whether alone or in connection with other terms, including, without limitation, BARGAINBEANIES.COM) within the domain name.

2. The Registrar Certificate for Perryman's BargainBeanies.com Internet domain name is hereby released entirely from the control and authority of this Court.

3. Paragraph 2 of this Order is stayed pending any appeal of this Order by Ty, but in the event that no appeal has been filed by January 17, 2003, the stay of paragraph 2 shall terminate and paragraph 2 shall thereafter be in full force and effect.

4. Costs in the amount of $299.39 taxed in favor of Defendant by the United States Court of Appeals for the Seventh Circuit are hereby awarded, and each party will bear all other of its costs and attorney fees for the entirety of this action.

SO ORDERED:

DATE: December 30, 2002

s/ John F. Grady

John F. Grady, United States District Judge

APPENDIX E -- ADDITIONAL RELEVANT STATUTES

15 U.S.C. §1114(1)

(1) Any person who shall, without the consent of the registrant--

(a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; or

(b) reproduce, counterfeit, copy or colorably imitate a registered mark and apply such reproduction, counterfeit, copy or colorable imitation to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used in commerce upon or in connection with the sale, offering for sale, distribution. or advertising of goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive,

shall be liable in a civil action by the registrant for the remedies hereinafter provided. Under subsection (b) hereof, the registrant shall not be entitled to recover profits or damages unless the acts have been committed with knowledge that such imitation is intended to be used to cause confusion, or to cause mistake, or to deceive.

As used in this paragraph, the term "any person" includes the United States, all agencies and

instrumentalities thereof, and all individuals, firms, corporations, or other persons acting for the United States and with the authorization and consent of the United States, and any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity. The United States, all agencies and instrumentalities thereof, and all individuals, firms, corporations, other persons acting for the United States and with the authorization and consent of the United States, and any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this Act in the same manner and to the same extent as any nongovernmental entity.

Appendix E

15 U.S.C. §1125(a)

(a)(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which--

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or anotherperson's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.